# STATE OF MICHIGAN

# COURT OF APPEALS

In re FORFEITURE OF A QUANTITY OF MARIJUANA.

PEOPLE OF MICHIGAN,

Petitioner-Appellee,

v

QUANTITY OF MARIJUANA, DRUG PARAPHERNALIA, 3551 EAST ALLEN RD, $360, NUMEROUS FIREARMS AND AMMUNITION, SKI-DOO SNOWMOBILE, 1965 CHEVROLET NOVA, and CAR TRAILER,

Defendants,

and

GERALD OSTIPOW and ROYETTA OSTIPOW,

Claimants-Appellants,

and

STEVEN PAUL OSTIPOW,

Claimant.

UNPUBLISHED
October 22, 2013

No. 310106
Saginaw Circuit Court
LC No. 08-900017-CF

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

Claimants Gerald and Royetta Ostipow appeal the trial court's order of forfeiture entered after this Court's remand in *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 243; 805 NW2d 217 (2011). For the reasons set forth, we affirm in part, reverse in part, and remand for further proceedings.

## I. FACTS AND PROCEEDINGS

Petitioner, state of Michigan, initiated a civil forfeiture proceeding in Saginaw Circuit Court for a quantity of marijuana, related paraphernalia, real property at 3551 East Allen Road, contents of the home, $360, numerous firearms and firearm accessories, a snowmobile, and an automobile. Steven Ostipow lived at the address when, on April 25, 2008, law enforcement officers executed a search warrant and seized hundreds of marijuana plants, processed marijuana, and related paraphernalia. Officers also executed a search warrant at 3996 East Allen Road, the nearby residence of Steven's parents, Gerald and Royetta Ostipow, where they seized the money, firearms, and firearm accessories.

Claimants,[1] Gerald and Royetta Ostipow, requested the return of the real and personal property seized by law enforcement. Petitioner filed a motion for summary disposition and, in response, claimants submitted affidavits stating that they had no knowledge of the illegal activity at 3551 East Allen Road, and argued that the real property and most of the associated personal property was not subject to forfeiture. The trial court granted plaintiff's motion for summary disposition and ordered forfeiture of the real and personal property identified in petitioner's complaint. This Court reversed, holding that claimants' "answer, affirmative defenses, and affidavits raised material issues of fact regarding claimants' so-called innocent owner affirmative defense sufficient to avoid summary disposition." *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 250. This Court explained that the innocent owner defense is an affirmative defense to a forfeiture action that requires a claimant "to produce evidence that [he or she] neither had knowledge of nor consented to the illegal activity forming the basis for forfeiture." *Id*. at 253. The Court ruled that because petitioner "did not produce additional evidence to rebut claimants' asserted innocent owner defense[,]" the trial court erroneously granted petitioner summary disposition. *Id*.

On remand, the case proceeded to trial. Testimony established that Gerald and Royetta bought 3551 East Allen Road in January 2001 and remodeled the interior of the residence over a period of years. They informally rented the residence to Steven, who converted the residence into a large-scale marijuana growing operation. Steven primarily resided at 3551 East Allen Road, but he occasionally lived with his parents at 3996 East Allen Road.

Joseph John Kurylowich testified that the houses at 3551 and 3996 East Allen Road were about a quarter of a mile apart. He told Detective John Butcher that he saw a marijuana grow operation inside 3551 Allen Road in 2008 and that, on each other occasion when he visited Steven, he smelled marijuana. Kurylowich testified that Gerald stopped by the house while he was there "once in a while" and, on two occasions, Gerald was present shortly after Steven and Joseph smoked marijuana. Deputy Natahn VanTifflin testified that, when he executed the search warrant in April 2008, there was a "significant smell of marijuana" outside the house. Officers recovered a total of 225 marijuana plants from the house at 3551 Allen Road.

Deputy VanTifflin further testified that, when they searched Gerald and Royetta's residence at 3996 East Allen Road, officers found in Steven's room, several videos with titles

[1] While Steven Ostipow was initially identified as a claimant, he has not appealed. References in this opinion to "claimants" are to Gerald and Royetta Ostipow.

suggesting they were related to growing marijuana, several firearms, photos in an envelope depicting marijuana plants and buds, and an agricultural calendar with notations that, in VanTifflin's experience, suggested they were references to growing marijuana.

DEA Agent David McGovern testified that he assisted in the searches of the homes, which he estimated were approximately one-half mile to one mile apart. He could smell marijuana on the porch of the 3551 house. When he interviewed Gerald, Agent McGovern told him that Steven said Gerald would not enter the house because he knew Steven was using the house to grow marijuana. According to Agent McGovern, in response to this statement, Gerald said, "I told him about that" as a warning.

Both claimants denied having any knowledge of the illegal activity at 3551 East Allen Road, which they purchased in 2001. Gerald and Royetta put a large down payment on the property at 3551 East Allen Road, which accounted for a large part of their life savings. Gerald put the property in his name only, but Gerald and Royetta both signed papers to place a mortgage on the house at 3996 so he and Royetta could deduct the mortgage interest on their taxes.

Gerald testified that he never smelled marijuana outside the house and no one ever suggested that Steven was doing something illegal inside the house. He further stated that he had not been inside the house for approximately 18 to 24 months. Before that, he, Royetta and Steven had spent three years remodeling the house, during which time Steven lived there. Gerald later admitted that, in February 2008, he repaired some doors on the house, including an inside door, after Steven said there was a burglary, but Gerald did not inspect the inside of the house because Steven said nothing was missing. Gerald testified that he did not see or smell marijuana at that time and, despite the damaged doors, he did not report the burglary to the police.

Royetta testified that the remodel of the house at 3551 took between six and seven years and that she and Gerald paid for all of the repairs. She recalled that Steven moved into the house in 2007 and she had not been inside for approximately 18 months before the raid in April 2008. Royetta testified that Steven spent a significant amount of time at their house at 3996 for dinner and every other weekend when he had visitations with his son. Royetta regularly washed Steven's clothes and did not smell anything unusual on them and does not know what marijuana smells like. She also cleaned Steven's room at 3996 every day, but never saw the videos about growing marijuana. They admitted that they were aware of Steven's convictions of cocaine use in November 2000 and marijuana possession in 2007.

The trial court ruled that claimants were not innocent owners for the following reasons: (1) claimants were aware that Steven had two previous convictions for drug-related offenses; (2) given certain pictures of Steven from college, claimants were aware that Steven had a problem with marijuana; (3) neon lights for growing marijuana must have been clearly visible through the windows at night; and (4) claimants failed to inspect the residence after the burglary or report the burglary to police. The trial court emphasized the fourth reason, explaining that no reasonable person would invest a substantial amount of time and effort into renovating a house, and then fail to investigate or report a burglary. The trial court reasoned that claimants did not investigate the interior of the residence or report the burglary because they were aware of the nature of the illegal activity inside.

## II. INNOCENT OWNER DEFENSE

Claimants argue that the trial court erred in finding that they were not innocent owners. "A trial court's decision in a forfeiture proceeding will not be overturned unless it is clearly erroneous." *In re Forfeiture of $180,975*, 478 Mich 444, 450; 734 NW2d 489 (2007). "A finding is clearly erroneous where, although there is evidence to support it, the reviewing court is firmly convinced that a mistake has been made." *Id*.

MCL 333.7521(1)(c) "provides for forfeiture of 'property which is used, or intended for use, as a container' for illegal narcotics or for materials, products, or equipment used, or intended for use, in manufacturing or distributing illegal narcotics." *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 340; 532 NW2d 915 (1995), quoting MCL 333.7521(1)(c). Under this statute, "upon proof by a preponderance of the evidence that real property subject to forfeiture has a substantial nexus to illegal drug activity, such that the property constitutes a 'container' under [MCL 333.7521(1)(c)], a court may order forfeiture of that real property." *Id*. at 342. "The substantial nexus test precludes forfeiture of property that has only an incidental or fortuitous connection to the underlying unlawful activity." *Id*.

MCL 333.7521(1)(f) provides in relevant part that "[a]ny thing of value that is furnished or intended to be furnished in exchange for a controlled substance . . . [or] that is traceable to an exchange for a controlled substance . . . or that is used or intended to be used to facilitate any violation of this article" is subject to forfeiture. MCL 333.7521(1)(f) further provides that "'[t]o the extent of the interest of an owner, a thing of value is not subject to forfeiture under this subdivision by reason of any act or omission that is established by the owner of the item to have been committed or omitted without the owner's knowledge or consent.'" *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 252, quoting MCL 333.7521(1)(f). This statute creates the "innocent owner defense," which protects property from forfeiture when the owner "proves that the proscribed act was done without his or her knowledge or consent, express or implied." *Id*. (citation and quotation marks omitted). "[T]he innocent owner defense is defeated if the claimant has either knowledge of 'or' consented to the illegal activity." *Id*. The term "knowledge" is limited to actual knowledge of the illegal activity; it does not include constructive knowledge. *Id*. at 252-253. Still, "[a] claimant's consent . . . might be implied from the circumstances even without knowledge." *Id*. at 253. Innocent ownership is an affirmative defense, so a claimant has the burden "to produce evidence that [he or she] neither had knowledge of nor consented to the illegal activity forming the basis for forfeiture." *Id*. When a claimant produces such evidence, the burden shifts back to the plaintiff "to produce clear and decisive evidence to negate the defense." *Id*.

"An affirmative defense is a defense that does not controvert the establishment of a prima facie case, but that otherwise denies relief to the plaintiff." *Chmielewski v Xermac, Inc*, 457 Mich 593, 617; 580 NW2d 817 (1998) (citation omitted). "The party asserting an affirmative defense has the burden of presenting evidence to support it." *Attorney General ex rel Dep't of Environmental Quality v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007). When a party satisfies this burden, the burden shifts to the plaintiff to produce "clear and decisive evidence" negating the affirmative defense. *Horvath v Delida*, 213 Mich App 620, 629; 540 NW2d 760 (1995) (citation and quotation marks omitted).

The trial court did not clearly err in ruling that Gerald was not an innocent owner. The trial court reasonably observed that when a person spends a significant amount of his or her savings to purchase a nearby house, the person should have a continuing interest in ensuring that the house remains in good condition. It would follow that when doors are broken in an apparent burglary, the person would reasonably investigate for other damage to fixtures in the house. Further, it would be reasonable for the person to report the burglary to the police, thus allowing for the possibility that the perpetrator would be apprehended and the house would not be burglarized in the future. The trial court logically concluded that, while Gerald fixed the doors broken in the burglary, because he neither investigated the residence for further damage nor reported the burglary to police, Gerald was aware that the residence was used for illegal activity and wanted to avoid exposing the interior of the residence to himself or law enforcement. Even if Gerald did not have "actual knowledge" that the residence was specifically used for growing marijuana, his consent "might be implied from the circumstances even without knowledge." *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 253. In other words, the trial court could have reasonably found that by deliberately avoiding the interior of the residence after the burglary, Gerald consented to whatever unknown illegal activity was occurring in the residence.

However, we hold that the trial court erred in ruling that Royetta was not an innocent owner.[2] Under MCL 333.7521, "[t]he state may only forfeit the ownership interest of the noninnocent owner. If, for example, the innocent owner has a fifty percent interest in the [property], the property may be sold and the proceeds divided equally between the state and the innocent co-owner." *In re Forfeiture of $53*, 178 Mich App 480, 496; 444 NW2d 182 (1989).[3]

As explained, the lack of an investigation or police report for the burglary at 3551 East Allen Road was the central basis for the trial court's decision. However, there was no testimony from Gerald, Royetta, or any other person to indicate that Royetta was aware of the burglary. The only evidence in the record regarding Royetta's alleged knowledge of Steven's criminal activity at the residence was testimony that she was aware that Steven had two previous convictions for drug possession, including one for possession of marijuana in 2007.[4] But it does

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[2] Petitioner asserts that Royetta did not have an ownership interest in 3551 East Allen Road because only Gerald's name was reflected on the deed. However, regardless of whether her name was reflected on the deed, Royetta at least had a legally recognized dower interest in the property. See *Thomas v Dutkavich*, 290 Mich App 393, 405-407; 803 NW2d 352 (2010). "No sole act of a husband can prejudice his wife's right to dower." *Id*. at 407. Based on *Zaher v Miotke*, ___ Mich App ___; ___ NW2d ___ (2013), we hold that the seizure and subsequent auction should remain valid transfers, but Royetta should be compensated for the value of her dower interest in 3551 Allen Road.

[3] This holding specifically addressed forfeiture proceedings under MCL 333.7521(1)(d)(*iv*). In *In re Forfeiture of $1,159,420*, this Court specifically applied this holding to forfeiture proceedings under MCL 333.7521(1)(f). *In re Forfeiture of $1,159,420*, 194 Mich App 134, 148; 486 NW2d 326 (1992).

[4] There was also evidence that Steven was photographed with marijuana in the early 1990s, but there was no evidence to indicate that claimants were aware of these photographs.

not logically follow that a person with two previous convictions for drug possession is necessarily producing hundreds of marijuana plants in his residence. Again, the standard is actual knowledge. *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 252-253. Once Royetta produced evidence that she did not have knowledge of or consent to the illegal activity at 3551 East Allen Road, "the burden shifted back to plaintiff to produce clear and decisive evidence to negate the defense." *Id*. at 253. Plaintiff did not produce "clear and decisive" evidence to negate the innocent owner defense with respect to Royetta, so the trial court clearly erred in forfeiting her rights to the property at issue.

## III. VENUE

Claimants argue that the trial court erred in denying their motion for a change of venue. We disagree.

The following footnote was included in this Court's prior opinion in this case:

> Although not raised as an issue on appeal, venue for this action is improper in Saginaw County. Claimants raised this issue in the trial court as one of jurisdiction, but the circuit court has state-wide jurisdiction. But venue regarding a claim to an interest in real property lies in the county where situated. All the personal property at issue was seized in Shiawassee County, and the real property is situated in Shiawassee County. In addition, the forfeiture complaint alleges only criminal activity in Shiawassee County. Consequently, it appears that venue regarding the forfeiture of the personal property would also properly be Shiawassee County.
>
> Despite the apparent improper venue, claimants must still move the trial court for a change of venue. A judgment entered in Saginaw County would not be voidable on the basis of improper venue. [*In re Forfeiture of a Quantity of Marijuana*, 291 Mich App at 247 n 2 (citations omitted).]

After remand, claimants moved for a change of venue to Shiawassee County. The trial court denied the motion, apparently because claimants failed to comply with MCL 600.1651 by bringing the motion within the time and in the manner provided by court rule. "We review for clear error a circuit court's decision to grant or deny a motion to change venue." *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 19; 812 NW2d 793 (2011). However, application of the law of the case doctrine is reviewed de novo. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). "Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case." *Id*. In this Court's prior decision, this Court decided a question of law in stating that "venue for this action is improper in Saginaw County." *In re Forfeiture of a Quantity of Marijuana*, 291 Mich App 247 n 2. Accordingly, plaintiff's argument that venue was proper in Saginaw County because the personal property was in the custody of Saginaw County is

unavailing because this Court has already decided as a matter of law that venue was improper in Saginaw County. *Ashker*, 245 Mich App at 13.

Nevertheless, this Court did not instruct the trial court to grant a motion to change venue. This Court simply stated that "claimants must still move the trial court for a change of venue." This statement allowed for the trial court to decide to grant or deny the motion in accordance with the statutes and court rules applicable to venue. Thus, it is necessary to determine whether the trial court clearly erred in denying the motion to change venue.

"MCR 2.221 requires a motion for a change of venue 'before or at the time the defendant files an answer,' unless 'the facts on which the motion is based were not and could not with reasonable diligence have been known to the moving party more than 14 days before the motion was filed.'" *Morrison v Richerson*, 198 Mich App 202, 206; 497 NW2d 506 (1992), quoting MCR 2.221. Here, the answer was filed on August 20, 2008, and claimants did not move for a change of venue until May 17, 2011. Moreover, the facts supporting the motion, i.e., the location of the real and personal property, either were known or should have been known by claimants when the proceedings were initiated. Claimants' motion for a change of venue was therefore untimely under MCR 2.221. Thus, the trial court did not clearly err in denying the motion.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Henry William Saad
/s/ Peter D. O'Connell